IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-10-09-2205 thru IN-10-09-2208
TITUS RODRIGUEZ	)	IN-10-09-2443 thru IN-10-09-2446
	)	IN-10-09-0076 thru IN-10-09-0080
Defendant	)	IN-10-09-1108 thru IN-10-09-1109
	)	IN-10-09-0716
	)	
	)	ID No. 1008012840
	)	

Submitted: April 18, 2011
Decided: April 28, 2011

MEMORANDUM OPINION

Upon Motion of Defendant to Dismiss -
GRANTED, In Part, and DENIED, In Part

Upon Motion of the State to Amend - ***GRANTED***

Appearances:

Annemarie Hayes, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, for State of Delaware

Joseph M. Leager, Jr., Esquire, of Wilmington, Delaware, Attorney for the Defendant

HERLIHY, Judge

The defendant, Titus Rodriguez, has moved to dismiss various counts of a fourteen count indictment against him. Those fourteen counts are:

Counts 1 - 6, rape first degree;

Count 7, strangulation;

Count 8, assault second degree;

Count 9, unlawful imprisonment second degree;

Count 10, malicious interference with emergency communications;

Count 11, endangering the welfare of a child; and

Count 12 - 14, non-compliance with bond conditions.

Rodriguez's original motion related to Counts 1 - 6, Count 8, Count 9, Count 10, and Count 11. As a result of his motion, Rodriguez's counsel and the prosecutor commendably have met and have reached a partial resolution of his motion. That resolution renders a portion of his motion moot. The remaining portions are the subject of the discussion below.

In his original motion, Rodriguez argued that the six counts of rape were vague and also subject to dismissal for multiplicity. In addition, he asserted that pre-trial discovery indicated that there were only three acts of alleged sexual intercourse, one "genital" and two fellatio. Because there were only three, his contention was that he could only be charged with three counts of rape. In response and as part of the agreement between the parties, the State has entered *nolle prosequis* on Counts 1, 3, and 5. Combined with the

discovery revelation, these *nolle prosses* moot the multiplicity argument.

Rodriguez's vagueness contention remains, however. It is that in none of the three remaining counts does the State allege which act of the statutorily defined ways of performing sexual intercourse was committed. Each of the three remaining counts charge rape in identical language:

> RAPE FIRST DEGREE in violation of Title 11, Section 773 of the Delaware Code.
>
> TITUS A. RODRIGUEZ, on or about the 15th day of August, 2010, in the County of New Castle, State of Delaware did intentionally engage sexual intercourse with Joanne Arnold, without her consent and it was facilitated by or occurred during the course of the commission or attempted commission of the felony Strangulation, or Assault Second Degree or the misdemeanor offense of Unlawful Imprisonment Second Degree.
>
> By statute, sexual intercourse is defined as:
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> (g)"Sexual intercourse" means:
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> (1) Any act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight. Ejaculation is not required. This offense encompasses the crimes commonly known as rape and sodomy; or
> (2) Any act of cunnilingus or fellatio regardless of whether penetration occurs. Ejaculation is not required.[1]

The State does not have to allege the specific act of sexual intercourse in any of the counts. Long standing Delaware precedent says an indictment for rape is sufficient when

[1] 11 *Del. C.* § 761(g).

it substantially uses the statutory language to set out the charge. In *Miller v. State*,[2] the Supreme Court said "without consent" included use of force and that force did not have to specifically alleged.[3] In *Klase v. State*,[4] the Supreme Court reiterated that principle.[5] In 1991 *Keichline v. State*,[6] the Supreme Court held that it was not necessary for the indictment to allege the specific type of intercourse in a rape indictment.[7]

Of course, whether there were three separate acts of sexual intercourse or two or just one has to await the *Wyant*[8]*/Feddiman*[9] analysis at trial and a possible jury instruction.

Rodriguez raises another vagueness claim. It has two parts. One part is that he is charged in each count with strangulation and assault second degree while committing the rape. His contention seems to be that strangulation is assault second degree and that the State has to specify which and it cannot be both. The trouble with this argument is that he is charged separately with strangulation (Count 7) and assault second degree (Count 8). These are distinct charges with distinct elements, and including both within each of the

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[2] 233 A.2d 164 (Del. 1967).

[3] *Id*. at 165.

[4] 346 A.2d 160 (Del. 1975).

[5] *Id*. at 162.

[6] 602 A.2d 1081 (Del. 1991)(Table).

[7] *Id*. at 7 - 8.

[8] *Wyant v. State*, 519 A.2d 649 (Del. 1986).

[9] *Feddiman v. State*, 558 A.2d 278 (Del. 1989).

three rape counts does not render them ambiguous.

The second part of this vagueness claim is that there are eleven separate ways in which a person can commit assault second degree.[10] He contends the State should have specified in each rape count which of the applicable ways of committing assault second degree applied in that count. Count 8 charges assault in the second degree in this way:

> COUNT VIII. A FELONY
>
> ASSAULT SECOND DEGREE in violation of Title 11, Section 612 of the Delaware Code.
>
> TITUS A. RODRIGUEZ, on or about the 15th day of August, 2010, in the County of New Castle, State of Delaware, did recklessly or intentionally cause physical injury to Joanne Arnold, a pregnant female.

This allegation is one of the ways in which one can commit assault second degree.[11] While it may have been preferable that each of the three rape counts make a more specific reference to Count 8, it is not necessary to have done so. The references in each count of rape to assault second degree and the specificity of Count 8 makes that unnecessary. As charged, each rape count puts Rodriguez on notice of the charge and does so in a way that prevents any double jeopardy concerns.

Rodriguez challenges Count 11 charging endangering the welfare of a child

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[10] 11 *Del. C.* §612.

[11] 11 *Del. C.* §612(a)(9). In his motion, Rodriguez states the complaining witness' pregnancy was discovered by health care workers during an examination after the rape allegations were made. The Court has no other information than that but the law provides it is no defense that the defendant was unaware the complaining witness was pregnant.

as vague since it only charges "assault:"

> COUNT XI. A MISDEMEANOR
>
> ENDANGERING THE WELFARE OF A CHILD in violation of Title 11, Section 1102(a)(4) of the Delaware Code.
>
> TITUS A. RODRIGUEZ, on or about the 15th day of August, 2010, in the County of New Castle, State of Delaware, did commit a violent felony, Strangulation, or Unlawful Imprisonment Second Degree or Assault, against Joanne Arnold, knowing that said crime was witnessed, either by sight or sound, by Jaylin Titus a child less than 18 years of age who is a member of the person's family or victim's family.[12]

He is correct as far as it goes. The indictment does not specify which degree of assault is incorporated into this count. He is charged with the felony of assault second degree and is nowhere charged with a separate count of assault third degree. The statute specifying the elements of endangering the welfare of a child provides an indirect answer to this issue. The subsection cited in the indictment, 11 *Del. C.* §1102(a)(4), provides:

> (a) A person is guilty of endangering the welfare of a child when:
>
> (4) The person commits any violent felony, or reckless endangering second degree, assault third degree, terroristic threatening, or unlawful imprisonment second degree against a victim, knowing that such felony or misdemeanor was witnessed, either by sight or sound, by a child less than 18 years of age who is a member of the person's family or the victim's family.[13]

Assault third degree as listed in that subsection is not a violent felony, it is a

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[12] Indictment Count XI.

[13] 11 *Del. C.* §1102(a)(4).

misdemeanor. Assault second degree is.[14] Necessarily, since the State did not charge the violent felony as assault second degree, and it has now agreed to charge this offense as a misdemeanor, the result is that the degree of assault is third.

Rodriguez has another challenge to Count 11. That count uses the phrase "a violent felony, Strangulation." Violent felonies are statutorily defined in 11 *Del. C.* § 4201. The crime of strangulation, by some oversight, is not listed as a violent felony. Thus, under Delaware it is not a violent felony. The State concedes this point and asks that the offending language "a violent felony" be stricken. Its letter to the Court is a little unclear, however, whether it also seeks the deletion of the word "strangulation." At least the offending phrase will be removed.

Rodriguez had challenged Count 9 on two grounds. One, is that it lacked probable cause to sustain it. Two, that what is alleged in the body of the charge is a misdemeanor, not a felony as captioned in the indictment. As to the latter the State has moved to amend that caption to charge a misdemeanor. That motion is granted and moots that part of Rodriguez's argument. His other challenge fails, too. An indictment is a finding of probable cause.[15] If there is an issue at trial of insufficient evidence that is a different matter to be taken up then.

The next count which is challenged is 10. Rodriguez says the conduct charged is

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[14] 11 *Del. C.* §4201(c).

[15] *Joy v. Superior Court*, 298 A.2d 315 (Del. 1972).

a misdemeanor and not a felony. He asks that the caption for that count be changed and the State concurs. Its motion to amend that caption is granted.

Conclusion

For the reasons stated herein, the defendant's motion to dismiss is **GRANTED, in part, and DENIED, in part**. Where noted, the State's motion to amend, unopposed, is **GRANTED**.

IT IS SO ORDERED.

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J.